

145

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. ~~95~~

91.

L. S. CLARK, PLAINTIFF IN ERROR,

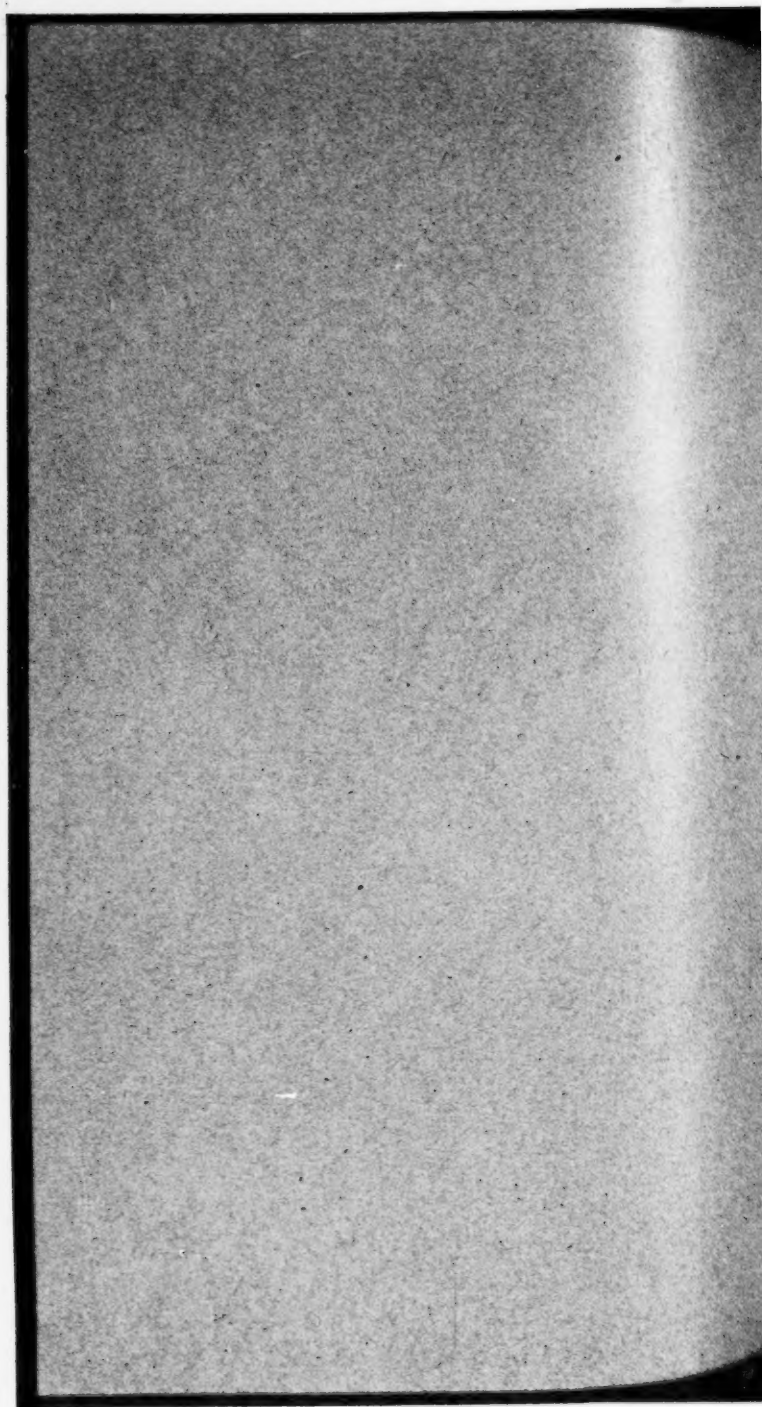
vs.

THE CITY OF TITUSVILLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

FILED JUNE 22, 1900.

(17,810.)



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 325

L. S. CLARK, PLAINTIFF IN ERROR,

VS.

THE CITY OF TITUSVILLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

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In the Court of Quarter Sessions of Crawford County, Pennsylvania.

COMMONWEALTH, Use of CITY OF TITUS-
ville, Pa.,
vs.
L. S. CLARK.

At No. 57 of February
Session, 1897.

And now, March 4, 1897, it is agreed by the parties to the above action that the same shall be tried as upon a case stated, and that the following case be stated for the opinion of the court in the nature of a special verdict:

First. That the city of Titusville, in the county of Crawford, was duly incorporated as a city by the act of General Assembly of Pennsylvania approved February 28, 1866, as will appear by reference to the Pamphlet Laws at page 116.

Second. That the said city, by proper ordinance, in 1875 duly accepted the provisions of the act of General Assembly of Pennsylvania approved May 23, 1874, and commonly known as the Wallace act, and thereby became a city of the third class.

Third. That under the provisions of the act of assembly approved May 8, 1889, P. L., 133, the said city is now a city of the third class and governed by the provisions of said act.

Fourth. That on June 25, 1888, the select and common councils of the said city passed, and the mayor thereof approved, the following ordinance:

June 25, 1888.—SEC. 1. That any person who shall deal in the selling of any goods, wares, merchandise, commodities or effects of whatsoever kind or nature, and such other persons, firms, partnerships, associations, companies, agencies, corporations or individuals as are otherwise hereinafter specifically provided for, shall pay to the treasurer of the city of Titusville, for the use of said city, on or before the first Monday of July in this year (1888), and on or before the first Monday of June of each year thereafter, the several sums hereinafter mentioned, as an annual license tax for selling such merchandise and performing such other kinds of business as

are specifically provided for in an act of the General Assembly of this Commonwealth dividing cities into seven classes, etc., approved May 24, 1887.

SEC. 2. That upon production to the mayor of said city of the treasurer's receipt for the license tax hereinafter named, the said mayor shall issue to such person, firm, partnership, association, corporation, company, agency or individual, a license in accordance with the terms of said act. Licenses shall be dated as of June 1st and shall continue for one year.

SEC. 3. First. That those who are esteemed and taken to make and effect annual sales to the amount of sixty thousand dollars and upwards, shall constitute class one, and pay one hundred dollars.

Second. Those to the amount of fifty thousand dollars and less

than sixty thousand dollars shall constitute class two, and pay eighty dollars.

Third. Those to the amount of forty thousand dollars and less than fifty thousand dollars shall constitute class three and pay seventy dollars.

Fourth. Those to the amount of thirty thousand dollars and less than forty thousand dollars shall constitute class four, and pay sixty dollars.

61 Fifth. Those to the amount of twenty thousand dollars and less than thirty thousand dollars shall constitute class five, and pay fifty dollars.

Sixth. Those to the amount of ten thousand dollars and less than twenty thousand dollars shall constitute class six, and pay thirty-five dollars.

Seventh. Those to the amount of five thousand dollars and less than ten thousand dollars shall constitute class seven, and pay twenty-five dollars.

Eighth. Those to an amount less than five thousand dollars and more than twenty-five hundred dollars shall constitute class eight, and pay fifteen dollars.

Ninth. Those to the amount of twenty-five hundred dollars and more than one thousand dollars shall constitute class nine, and pay ten dollars.

Tenth. Those to the amount of one thousand dollars and less shall constitute class ten and pay five dollars.

Eleventh. That persons or firms doing a wholesale business exclusively shall constitute class eleven and pay : Those who are estimated and taken to make and effect annual sales to the amount of—

62

\$100,000 and upwards	shall constitute class	1 and pay.....	\$60
60,000 " " " " " "	2 " " " " " "	50	
50,000 to \$60,000	" " " " " "	3 " " " " " "	40
40,000 " 50,000	" " " " " "	4 " " " " " "	35
30,000 " 40,000	" " " " " "	5 " " " " " "	30
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10,000 " 20,000	" " " " " "	7 " " " " " "	20
5,000 " 10,000	" " " " " "	8 " " " " " "	15
2,500 " 5,000	" " " " " "	9 " " " " " "	10
2,500 " " " " " "	10 " " " " " "	5	

SEC. 4. That contractors whose business and real-estate agents whose annual sales exceed one thousand dollars per annum shall be classed and rated as provided for in sec. III of this ordinance, and shall pay licenses according to said section.

SEC. 5. That auctioneers shall pay twenty-five dollars per annum, and their license shall not be transferable.

SEC. 6. That keepers of refreshment stands shall pay a license tax of two dollars and fifty cents per day.

SEC. 7. That peddlers of merchandise and meat peddlers, with

wagon drawn by one horse, shall pay fifteen dollars per annum; peddlers of merchandise and meat peddlers, with wagon drawn by two horses, shall pay twenty-five dollars per annum; peddlers, commonly called "pack peddlers," shall pay five dollars per annum; pawnbrokers shall pay a license tax of fifty dollars per annum; brokers in oil, petroleum or other products, shall pay ten dollars per annum; hawkers shall pay a license tax of five dollars per day; keepers of billiard and bagatelle tables or

63 bowling alleys shall pay for each table or alley five dollars per annum; owners of drays, carts or wagons used in the city for pay, drawn by one horse, shall pay a license tax of five dollars per annum for each vehicle; those drawn by two horses shall pay ten dollars per annum; owners of hacks, stages and carriages, shall pay a license tax of ten dollars per annum for each vehicle; owners of omnibuses shall pay a license tax of fifteen dollars per annum for each vehicle; owners of baggage wagons shall pay twelve dollars per annum for each vehicle; livery-stable keepers shall pay for each horse kept for hire, two dollars; circuses and menageries shall pay a license tax of fifty dollars per day. Exhibitions or shows under a tent, other than a circus, shall pay a license tax as follows, to wit: Exhibitions or shows that charge an entrance fee of ten cents, four dollars per day; exhibitions or shows that charge an entrance fee of twenty-five cents or over ten cents, ten dollars per day. That the owner or lessee of any theatre, opera-house or hall for public entertainment, shall pay a license tax of four dollars per night or, in lieu thereof, may pay an annual license tax of seventy-five dollars, to date of June 1st of each year. All other shows, museums, concerts or exhibitions, not herein otherwise provided for, shall pay a license tax of two dollars and fifty cents per day.

64 SEC. 8. Bill-posters shall pay an annual license tax of twenty-five dollars.

First. Market-house companies, express companies, telegraph, telephone, steam, heating, gas, natural gas, electric light or power companies, or agents or individuals furnishing communication, light, heat or power by any of the means above enumerated, which and who are esteemed and taken to make and effect an annual business of twenty-five thousand dollars or more, shall constitute class one and pay an annual license tax of one hundred and fifty dollars.

Second. Those to the amount of fifteen thousand dollars and less than twenty-five thousand dollars shall constitute class two, and pay a license tax of one hundred dollars.

Third. Those to the amount of ten thousand dollars and less than fifteen thousand dollars shall constitute class three, and pay seventy-five dollars.

Fourth. Those to the amount of five thousand dollars or less than ten thousand dollars shall constitute class four, and pay fifty dollars.

Fifth. Those to the amount of five thousand dollars or less shall constitute class five, and pay twenty-five dollars.

65 SEC. 10. That each insurance agent shall pay an annual license tax of fifteen dollars per annum.

SEC. 11. First. Banks, bankers and banking associations, whose average yearly deposits are esteemed and taken to be four hundred thousand dollars and upwards shall constitute class one, and shall pay an annual license tax of two hundred dollars.

Second. Those to the amount of three hundred thousand dollars and less than four hundred thousand dollars shall constitute class two, and shall pay one hundred and fifty dollars.

Third. Those to the amount of two hundred thousand dollars and less than three hundred thousand dollars shall constitute class three, and shall pay one hundred dollars.

Fourth. Those to the amount of one hundred thousand dollars or less shall constitute class four, and pay fifty dollars.

SEC. 12. That all persons canvassing or soliciting within said city, orders for goods, books, paintings, wares or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business and shall pay to the said treasurer therefor for one year the sum of twenty-five dollars.

66 SEC. 13. That any person or persons, company, agency, partnership, association or corporation commencing business after the time at which licenses are issuable under this ordinance, shall take out a license from that time until the next yearly issuing thereof, for which period shall be paid, if taken out prior to December 1st, the full amount of a yearly license, and if taken out subsequent thereto, one-half of the said amount. That for the purpose of fixing the amount of license tax to be paid by the several persons, partnerships, associations, firms, companies, agencies and corporations hereinbefore provided for, the respective assessors in and for the several wards of said city, for the present year, prior to June 26, 1888, and at the times of making their annual assessments in subsequent years, shall rate and classify the persons, partnerships, associations, firms, companies, agencies and corporations as by this ordinance herein provided and shall notify such persons, companies, partnerships, associations, firms, agencies and corporations at least three days before the time fixed for appeal, of the amount of license tax assessed and class in which such person, companies, firms, partnerships, associations and corporations are placed.

SEC. 14. That the present committee on taxes shall constitute the board of appeal for the present year and shall meet at the city hall on the 28th day of June of the present year, at 10
67 o'clock a. m. and continue the session for two days and in subsequent years the board of appeal shall consist of the regular board of appeal to be elected as provided in section 7 of article XIX of the act of assembly of this Commonwealth, approved May 24, 1887, dividing cities into seven classes, etc., and all appeals made from assessments as aforesaid, shall be made to the said board of appeal at the time fixed by said board for hearing appeals from assessments on real estate.

SEC. 15. That the mayor shall keep a minute record of licenses

granted and for what purposes and make report of the same to the councils at least once each month.

SEC. 16. That no manufacturer, who is a citizen of the city of Titusville, shall be considered a dealer or vender or merchandise within the spirit of this ordinance unless he sells goods not of his own manufacture.

SEC. 17. That the amount of license required to be paid by any person, firm, company, agency, partnership, association or corporation, upon failure in payment thereof may be recovered in an action of debt before any magistrate, alderman or justice of the peace of said city, together with twenty per cent. added as a penalty, together with costs of suit.

SEC. 18. That any person or persons failing to obtain a license as required by this ordinance shall upon conviction thereof before any magistrate, alderman or justice of the peace of said city forfeit and pay a fine not exceeding one hundred dollars or less than the amount required for a license to such person or persons, together with twenty per cent. added as a penalty with costs of suit, and in default of payment thereof shall undergo a confinement in the city or county prison for a period not exceeding thirty days or perform hard labor upon the streets of or elsewhere in said city, not succeeding such period. That any one giving information whereby any person or persons convicted of violation of this ordinance or its supplements, shall be entitled to one-half of any penalty or fines collected for such violation.

Fifth. That the said city of Titusville, by ordinance duly enacted, authorized and directed its real-estate assessors each year to value the amount of business done by the several dealers, vendors, and merchants therein and place them in their respective classes as provided in section three of the said recited ordinance and assess each with the amount of license tax therein provided for.

Sixth. That the said defendant was for the years 1895 and 1896 and prior and subsequent thereto a retail grocer in the said city.

Seventh. That the said assessors for the year 1895 placed defendant in class six as provided in said section three and assessed him with a license tax of thirty-five dollars; that for the year 1896 they placed him in class seven and assessed him with a tax of twenty-five dollars.

Eighth. That the said defendant has not paid the said license, taxes for the years 1895 and 1896; neither have many other vendors, dealers, and merchants of the said city, especially those in class ten.

Ninth. That there are in the said city a number of merchant tailors, each of whom for the years 1895 and 1896 and prior and subsequent thereto ran and maintained a store in the said city where he sold suits, overcoats, and clothing manufactured by them to the amount of several thousand dollars annually, and against all of whom the said city, acting under section sixteen of the said ordinance, always has and still does omit to assess any license tax whatever.

Tenth. That there are in the said city a number of tanners and

tinsmiths, citizens thereof, each of whom for the years 1895 and 1896 and prior and subsequent thereto ran and maintained a store in the said city where he sold tinware of his own manufacture to the amount of several hundred dollars annually, and against all of whom the city, acting under said section sixteen, always has and still does fail to assess any license tax whatever.

70 Eleventh. That there is in the said city a tombstone dealer, a citizen thereof, who for the years 1895 and 1896 ran and maintained a store in the said city where he sold tombstones to the amount of several thousand dollars annually of his own manufacture, and against whom the said city, acting under the said sixteenth section, always has and still does fail to assess any license tax whatever.

Twelfth. That there are wholesale dealers, vendors, and merchants in the said city doing business during the years 1895 and 1896 and prior and subsequent thereto who were assessed with a license tax graded according to the tenth class of the third section of the said ordinance of June 25, 1888.

Thirteenth. That there is in the said city a large number of contractors whose business does not exceed one thousand dollars per annum and who for the years 1895 and 1896 and prior and subsequent thereto were neither assessed by the said city nor paid a license tax of any size whatever.

Fourteenth. That there is in the said city a number of real-estate agents whose annual sales for the years 1895 and 1896 and prior and subsequent thereto did not exceed one thousand dollars and who for the said period were neither assessed by the said city nor paid a license tax of any size whatever.

71 Fifteenth. That all the classes named in section three of the said ordinance, except the first, embrace one or more retail vendors, dealers, or merchants in the said city, there being no retail merchant in the said city doing a business each year large enough to place him in the first class.

If the court be of the opinion that the said license taxes against defendant are legal and valid, then a fine be entered for the plaintiff and against the defendant for the total of the said taxes, to be reserved for the use of the city of Titusville, but if the court be not of that opinion, then judgment be entered for the defendant; costs to follow judgment, either party reserving the right to sue out a writ of error or certiorari or appeal from the said judgment.

GEO. A. CHASE,

Solicitor for the City of Titusville.

BYLES & MACKEY,

Attorneys for the Defendant.

Endorsement: No. 57. February sessions, 1897. Commonwealth v. L. S. Clark. Agreement of counsel and case stated. Filed March 8, 1897. Curtis S. Clark, clerk (per Mason).

In the Court of Quarter Sessions of Crawford County.

COMMONWEALTH }
 vs. } No. —. Feb'y Term, 1897. Case Stated.
 L. S. CLARK. }

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Opinion.

A reargument is ordered in this case.

Per curiam.

CURTIS S. CLARK, *Clerk.*

Endorsement: No. —. Feb'y term, 1898, C. Q. S. Commonwealth vs. L. S. Clark. Opinion. Filed Jan. 1, 1898. E. T. Mason, pro. Filed Jan. 4, 1897. Curtis S. Clark, clerk.

In the Court of Quarter Sessions of the Peace of Crawford County.

COMMONWEALTH }
 v. } No. 57. February Sessions, 1897.
 L. S. CLARK. }

Surcase stated.

Opinion.

By agreement of counsel this case is tried upon a case stated for the opinion of the court in the nature of a special verdict.

The city of Titusville is and has been since 1875 a city of the third class, and on June, 25th, 1888, the legislative body of said city duly and regularly passed and the mayor of said city duly approved of the ordinance by virtue of which the license tax under consideration is imposed.

The ordinance was evidently enacted by virtue of the unconstitutional act of May 24, 1887, but the municipal actions had under and based upon said act were legally ratified by the

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act of May 13, 1889.

Melick v. Williamsport, 162 P. S., p. 208.

City of Chester v. Pennell, 169 P. S., p. 300.

Nor is there any contention of the parties upon this point, but defendant denies the legality of the ordinance upon two grounds, viz:

First. Because certain of the merchants and business men of Titusville are exempt from any taxation whatever; and,

Second. The tax imposed is not uniform, and the classification adopted is prohibited by the fourteenth amendment to the Federal Constitution.

The tax imposed being authorized by clause 4, section 3, of article V of the act of May 23, 1889, is for general revenue purposes, and by virtue of the general taxing powers of the municipality, and not through or by virtue of its police powers.

Williamsport v. Wenner, 172 P. S., p. 173.

Oil City v. Trust Co., 151 P. S., p. 459.

Section 3 of the ordinance classifies those who make and effect annual sales of divers amounts. Section 4 provides "that contractors whose business and real-estate agents whose sales exceed one thousand dollars per annum shall be classified and rated as
74 provided for in sec. III of this ordinance, and shall pay a license according to said section."

By section 3 no exemption is allowed to persons doing an annual business of less than \$1,000, and as contractors and real-estate agents are otherwise classified with the persons making and effecting sales to thus exempt a part of the class doing an annual business of less than \$1,000 and impose a tax upon others belonging to the same class is clearly violative of secs. 1 and 2, art. IX, of the constitution of this Commonwealth.

Commonwealth v. Brewing Co., 145 P. S., p. 84.

Commonwealth v. Sharon Coal Co., 164 P. S., p. 305.

Fox and Wife's Appeal, 112 P. S., p. 337.

Pittsburg v. Coyle & Co., 165 P. S., p. 64.

This exemption is class legislation, which is forbidden by the Constitution, and not in any way nor under any guise to be tolerated. This portion of the ordinance must fall, but this defect alone does not render the entire ordinance void.

As was said by our supreme court in *Fox and Wife's Appeal*, 112 P. S., p. 355, in declaring unconstitutional that part of the act of 1885 which excepted from taxation notes or bills for work or labor done: "But for this vice we are not required to declare the act of 1885 void. The second section of article IX of the constitution provides: 'All laws exempting property from taxation, other than

75 the property above enumerated, shall be void.' The exemption of 'notes or bills for work or labor done' is void under this provision, and drops out of the act of 1885. The exception falls, but the act stands. It will be the duty of the assessors to assess and return such bills or notes the same as other moneyed securities in the hands of individuals."

Section 16 of said ordinance provides: "That no manufacturer who is a citizen of the city of Titusville, shall be considered a dealer or vendor of merchandise within the spirit of this ordinance unless he sells goods not of his own manufacture."

We think that distinguishing such persons from the ones classified in said ordinance is a valid exercise of the power of the legislative body of said city.

We can readily understand how and why manufacturers who regularly have taxable capital invested in a plant, and whose chief item of profit consists in converting the raw material into the finished product, should not be classified with vendors of merchandise whose chief capital consists of their stock in trade, and whose profits are derived from selling at retail at an advanced price over that of the wholesale purchase.

If the entire classification in this ordinance rested on as good, valid, and reasonable grounds as does this distinction or
76 classification, if we may so term it, we would see little to complain of.

Whether or not the merchant tailors, tinsmiths, and tombstone dealers referred to in the case stated come under the manufacturers provided for by section 16 need not now be decided; nor need we decide in this action the rights of defendant against the city for a failure of its officials to enforce the ordinance against others who may properly come under its provisions.

Even were the said 16th section unconstitutional and void, we do not think that would invalidate the entire ordinance.

Vide supra, Fox and Wife's Appeal.

Let us, then, examine the second objection to the validity of this ordinance and, bearing in mind that it is a tax levied for general revenue purposes, determine whether the taxes levied by virtue thereof and under the classification therein adopted are forbidden by the fourteenth amendment to the Federal Constitution, or whether they lack that uniformity imposed by the constitution of this Commonwealth.

The said amendment provides: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

77 It is true, as urged, that the equal protection of the laws herein enjoined is a pledge of the protection of equal laws; *Yick Wo v. Hopkins*, 118 U. S., p. 369; but it does not forbid a classification of persons or property for various purposes nor enjoin upon the legislative authorities the impossible duty of making the same or equal laws for the several classes. It does compel the equal application of the laws to all members of the same class, allowing classification, which should be based upon reasonable grounds, and is not a mere arbitrary selection.

Gulf, Colorado and Santa Fe R'y v. Ellis, 165 U. S., p. 165.

Such classification is not only allowed, but is recognized as necessary, in order that uniformity and equality of taxation and of the just adaption of property to its burdens may be accomplished.

W. U. Tel. Co. v. Indiana, 165 U. S., p. 304.

Pacific Express Co. v. Seibert, 142 U. S., p. 351.

In all cases where classification for purposes of taxation has been recognized it has been held that the requirements of the Federal Constitution have been fulfilled if the rates, though different for separate classes, operate uniformly on each class.

Chicago R. R. Co. v. Iowa, 94 U. S., p. 164.

Dow v. Beidelman, 125 U. S., p. 698.

78 *Commonwealth v. Sharon Coal Co.*, 164 P. S., p. 305.

Home Ins. Co. v. New York, 134 U. S., p. 606.

Kentucky Railroad Tax Cases, 115 U. S., p. 322.

If the ordinance passed and the classification made therein is not in conflict with the Federal Constitution or some valid act of Congress, the court may not say whether the law is the best that could have been enacted, or whether the common

good demands or requires such a law. We can only determine whether, in such a case, the legislative body, acting under the laws and constitution of this Commonwealth, had the power and authority to enact such a law.

The responsibility of the legislative body for so acting, if they had the power so to do, is not to the court, but to the people whom they represent; and for a construction of the Federal laws and Constitution we must look to our Federal courts, while the construction of the constitution and laws of the Commonwealth, so far as they do not conflict with those of the nation, is determined by our own courts.

Chicago R. R. Co. *v.* Iowa, 94 U. S., p. 164.

Memphis Gas Co. *v.* Shelby Co., 109 U. S., p. 400.

United States *v.* New Orleans, 98 U. S., p. 392.

Merriwether *v.* Garrett, 102 U. S., p. 472.

Spencer *v.* Merchant, 125 U. S., p. 355, and the cases therein cited.

79 Palmer *v.* McMahon, 135 U. S., p. 669.

Fallbrook Irrigation District *v.* Bradley, 164 U. S., p. 155.

Lewis *v.* Monson, 151 U. S., p. 549.

Iowa Central Railway Co. *v.* Iowa, 160 U. S., p. 393.

Central Land Co. *v.* Laidley, 159 U. S., p. 109.

No objection is raised in this case as to the method of making the assessments or arriving at valuations. The principal contention is that by virtue of the classification made unequal burdens and rates are imposed upon the several members of different classes, but it is not alleged, with the exceptions heretofore noted, that the ordinance applies to or is enforced differently against the same members of any class.

We therefore conclude that the ordinance in question does not violate the provisions of the Federal Constitution, and we must determine whether or not it is in conflict with the constitution and laws of this Commonwealth.

Article IX, sec. 1, of our constitution declares that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." We herein have a recognition of the classification of subjects for taxation, and a provision that said taxes must be uniform as to each class.

The constitution of this Commonwealth, as well as the
80 Federal Constitution, not only permits classification of subjects of taxation on a proper basis and in the approved manner, but the several classes thereby constituted may be taxed independently and differently.

German Life Ins. Co. *v.* Commonwealth, 85 P. S., p. 519.

Commonwealth *v.* Del. Div. Canal Co., 123 P. S., p. 620.

Pittsburg *v.* Coyle & Co., 165 P. S., p. 64.

Commonwealth *v.* Brewing Co., 145 P. S., p. 86.

Commonwealth *v.* Sharon Coal Co., 164 P. S., p. 305.

We must, therefore, consider whether the classification herein made produces the result of special legislation; whether taxes imposed are uniform, as required by the Constitution, and whether the classification is made upon such basis as is by law required.

It is complained that wholesalers are made a distinct and separate class from retailers, and that the ordinance specially legislates in favor of the wholesalers.

This is true, so far as separately classifying the wholesale dealers is concerned, but each member of the subclass of wholesalers is treated alike, and the tax is uniform upon each member of said division or subclass.

We see no objection to classifying wholesalers and retailers separately. The same principle is involved in the subdivision of the wholesalers as maintains in the general classification under section 3 of the ordinance, and what is said in relation thereto equally applies to the subdivision of wholesalers.

If special legislation is produced in this ordinance it is a result of the mode of classification adopted.

The several members of the respective classes and subclasses, with the exception heretofore noted, are treated alike, and the taxes imposed upon them are uniform throughout their class.

Is the classification herein made legal?

In *Ayar's Appeal*, 122 P. S., p. 277, the court says: "On the contrary, the underlying principle of all the cases is that classification, with a view of legislating for either class separately, is essentially unconstitutional unless a necessity therefor exists—a necessity springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately, that would be useless and detrimental to others."

This is as near to a definition of the requirements for classification as our courts have attempted. It is true this refers to classification for legislative purposes, but we know of no reason why the same does not obtain in the classification for the purposes of taxation. Each class should have purposes to subserve peculiar to itself, and all its members local functions to perform which differentiates them from the members of each and every other class. When such a state of facts exists classification is not only permissible, but is necessary to subserve the purposes of the members, as a part of the body politic, as well as of their individual classes, and may be the only means whereby uniformity of taxation can be accomplished.

The "classification should be according to some reasonable, practical rule, drawn from experience, which would prevent a gross inequality in the burdens of taxation."

Commonwealth v. Canal Co., 123 P. S., p. 620.

Weinman v. Pass. Ry Co., 118 P. S., p. 202.

It is the legislative authority that must determine what differences in situation, circumstances, and needs call for a classification, subject, however, to the supervision of the courts, as the final in-

terpreters of the Constitution, and to see that the same is really classification and not special legislation.

Lloyd v. Smith, 176 P. S., p. 218.

The classification made by this ordinance is as follows :

83		Retail.	
Class.	Business.		Tax.
1.....	Over \$60,000.....		\$100.00
2.....	\$50,000 to 60,000.....		80.00
3.....	40,000 " 50,000.....		70.00
4.....	30,000 " 40,000.....		60.00
5.....	20,000 " 30,000.....		50.00
6.....	10,000 " 20,000.....		35.00
7.....	5,000 " 10,000.....		25.00
8.....	2,500 " 5,000.....		15.00
9.....	1,000 " 2,500.....		10.00
10.....	1,000.....		5.00

Wholesale.

1.....	\$100,000 and upwards.....	\$60.00
2.....	60,000 to \$100,000.....	50.00
3.....	50,000 " 60,000.....	40.00
4.....	40,000 " 50,000.....	35.00
5.....	30,000 " 40,000.....	30.00
6.....	20,000 " 30,000.....	25.00
7.....	10,000 " 20,000.....	20.00
8.....	5,000 " 10,000.....	15.00
9.....	2,500 " 5,000.....	10.00
10.....	2,500.....	5.00

84 Is this classification, made by the proper legislative authority, such as is reasonable, just, and proper, or was it passed for the purpose of or does it produce the result of special legislation for any of the respective classes?

It is urged that it is unequal and unjust. We again repeat that this may be true, as in most cases of assessments we find like results to a greater or less extent, but unless it is grossly so, or the ordinance enacted with the view or effect of producing such results contrary to law, the place to seek relief is with the legislative authority.

It is as impossible to produce exact uniformity in levying taxes as it is to give universal satisfaction, but if no legal principles have been violated we are powerless to adjust all of the inequalities complained of.

The knowledge or judgment of the judiciary under given circumstances as to what is equitable taxation is no better than that of the legislative authority, and as this is the department upon whom is imposed the duty of making the adjustment, there it must rest, so long as they act within their authority.

It may be true that the results produced of advantage to the dealers, from the sources to which this general tax is applied, may be in

the exact or at least approximate ratio of the burdens imposed by this license tax, and that the expense to the municipality in rendering such protection and producing such results is in like proportion. For example, we certainly could not say that the expense to the city of furnishing police and fire protection to the man who does \$100,000 worth of business is 100 times as great as for that of him who does \$1,000 worth.

We know of no better authority to determine the proper ratio and adjust the burdens of taxation in proportion to the expense imposed and benefits received by the various subjects than the one upon which the law now imposes it.

Classification according to the amount of business done has been frequently recognized in this Commonwealth and by our Federal courts.

Dow v. Beidelman, 125 U. S., p. 690.

Chicago R. R. Co. v. Iowa, 94 U. S., p. 164.

Allentown v. Gross, 132 U. S., p. 322.

Hadtler v. Williamsport, 15 W. N. C., p. 138.

Williamsport v. Wenner, 172 U. S., p. 173.

The last of which cases was very much like the case at bar, and a classification there adopted very similar, though not so justly discriminating as to the smaller dealers, was held to be a valid exercise of the powers of the city council.

It is argued, however, that in the case of *Williamsport v. Wenner* the initial class was composed of those doing a business of \$1,000 or less and paid \$1, "and every multiple of that amount of business paid a similar multiple of that amount of tax," and that this was "fair and equitable."

We do not find that the classification thus adopted produced any "fairer" results than does the one at bar. What was argued is true as to the maximum of each class only, and why the man doing \$1,100 worth of business and paying the same tax as the one doing \$5,000 worth can be considered any more of a fair and equitable proportionate adjustment than the one at bar we do not clearly comprehend.

The right to make such classification seems to be settled by our courts. We are not unfamiliar with a similar classification as to sales, with different rates as to different classes in the State mercantile tax imposed upon vendors of merchandise. True, the act by virtue of which this is made was passed prior to the adoption of our present constitution.

The right to make the classification being determined, we have no doubt as to the legislative authority to impose different "rates" upon the several classes.

And now, July 11, 1898, it is ordered that the defendant pay a fine of seventy-two dollars to the Commonwealth, for the use of the City of Titusville and the costs of prosecution, or give security therefor within ten days from this date, and in default thereof he shall stand committed to the county jail for a period of twenty days.

Per curiam.

July 11, 1898.—Defendant excepts to the opinion and order of court, and thereupon bill of exceptions is sealed for said defendant.

FRANK J. THOMAS, P. J. [SEAL.]

* * * * *

89-93 COM., for Use, } No. 46. April Term, 1899, Q. S. Crawford
28. } County. Filed July 28th, 1899.
CLARK. }

W. W. PORTER, J.:

The contention here arises upon a case stated. The sole question at issue is the constitutionality of an ordinance of the city of Titusville under which a license tax is sought to be collected. The municipal legislation is alleged to be in violation of the provisions of the Federal Constitution and of the constitution of the Commonwealth. The sentence imposed by the court below affects the liberty of the defendant. These are important matters and would ordinarily lead us to a full expression of our views. The court below has, however, filed an opinion in which all the authorities seemed to have been examined with care. No question raised seems to have been overlooked or failed of adequate consideration. The conclusions reached put in application the principles adequately discussed. A repetition of the discussion would throw no additional light upon the case. We are all of opinion that the judgment of the court below should be sustained.

Judgment affirmed.

94

Specifications of Error.

In the Supreme Court of Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA, }	
Use of the City of Titusville, }	At No. 323 of January Term,
v. }	1899.
L. S. CLARK, Appellant. }	

And now, April 23, 1900, comes the appellant, by his attorney, and files the following specifications of error in the above-entitled case:

First. The court erred in not holding that the ordinance of the city of Titusville approved June 25, 1888, and recited in the case stated was unconstitutional, and therefore invalid, because the taxes levied thereunder were not uniform, and therefore conflicted with the first section of the ninth article of the constitution of this Commonwealth.

Second. The court erred in not holding that the said ordinance conflicted with the second section of the ninth article of the constitution of Pennsylvania because of the exemption from taxation therein contained, and was therefore invalid and of none effect.

Third. The court erred in not holding the ordinance in question

95 unconstitutional because it denied to the prisoner the equal protection of the laws of this Commonwealth, and therefore conflicted with the fourteenth amendment to the Constitution of these United States.

Fourth. The court erred in not holding the said ordinance unconstitutional because special legislation and forbidden by the first section of the ninth article of the constitution of this Commonwealth.

Fifth. The court erred in not holding the ordinance complained of unconstitutional and invalid and of none effect.

Sixth. The court erred in imposing a sentence upon the prisoner, the appellant.

JULIUS BYLES,
EUGENE MACKEY,
Attorneys for Appellant.

Endorsement: No. 323. January Term, 1899. Commonwealth of Pennsylvania, use of City of Titusville, appellee, v. L. S. Clark, appellant. Specifications of error. Filed Apr. 23, 1900, in supreme court. Byles & Mackey.

Opinion.

COMMONWEALTH, to Use of the	{	No. 323. January Term, 1899.
City of Titusville,		Appeal from the Superior
v.		Court.
L. S. CLARK.	}	

96-102

Filed May 7, 1900.

PER CURIAM:

We concur entirely with the views expressed in the opinion of the learned judge of the court of quarter sessions in this case, and on that opinion the judgment is affirmed.

STATE OF PENNSYLVANIA, }
Eastern District, } ss:

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania in and for the eastern district, do hereby specify that the above and foregoing is a true copy of the opinion in the above-entitled cause so full and entire as appears of record in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Philadelphia, this 7th day of June, A. D. 1900.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

{ Ten-cent United States internal-revenue stamp, }
canceled 6, 7, 1900. C. S. G. }

103 In the Supreme Court of the United States.

L. S. CLARK, Plaintiff in Error, }

v.
THE CITY OF TITUSVILLE, De- } At No. 325 of October Term, 1900.
fendant in Error.

And now, September 18, 1900, comes the plaintiff in error, by his counsel, and files the following assignments of error to the action of the supreme court of Pennsylvania:

First. The said court erred in not holding that the ordinance of the city of Titusville passed and approved June 25, 1888, and recited in the case stated at length, conflicts with the fourteenth amendment to the Constitution of the United States, and is therefore unconstitutional, null, and invalid, because in subdividing the merchants and tax-payers of the said city and their property into so-called "classes," which differ not in kind, but only in amount or value, and then levying or assessing upon each of such so-called "classes"

104 so created taxes which do not operate uniformly upon the members of each so-called "class," inasmuch as the lowest amount or value of property therein is required to pay the same amount of tax with the highest amount or value of property therein, the ordinance deprives plaintiff in error of his property without due process of law and denies to him the equal protection of the laws.

Second. The said court erred in not holding that the said ordinance conflicts with the fourteenth amendment to the Constitution of the United States and is unconstitutional, null, and invalid because in subdividing the merchants and tax-payers of the said city into so-called "classes," which differ not in kind, but only in amount or value, and then levying or assessing upon each of the said "classes" taxes which decrease in rate or ratio as the value of the "class" increases, the ordinance deprives the plaintiff in error of his property without due process of law and denies to him the equal protection of the laws.

Third. The said court erred in not holding that the said ordinance conflicts with the fourteenth amendment to the Constitution of the United States and is unconstitutional, null, and void because all the so-called "classes" erected by the said ordinance by value or quantity of business or property are but subdivisions of a class, and imposing taxes upon such subdivisions without regard to a
105 common ratio either as between the several subdivisions themselves or as between the members of each of the said subdivisions deprives the plaintiff in error of his property without due process of law and denies to him the equal protection of the laws.

Fourth. The said court erred in not holding that the classification attempted by the said ordinance deprives plaintiff in error of his property without due process of law and denies to him the equal protection of the laws and conflicts with the fourteenth amendment to the Constitution of the United States, and that the ordinance is unconstitutional, invalid, and null.

Fifth. The court erred in affirming the judgment or sentence imposed upon the plaintiff in error by the court of quarter sessions of Crawford county, Pennsylvania, and in not discharging him from custody.

Wherefore the plaintiff in error prays that the judgment or sentence aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things he hath lost by reason of the said judgment or sentence.

EUGENE MACKEY,

Counsel for the Plaintiff in Error.

106 And now, September 18, 1900, comes the plaintiff in error, by his counsel, and declares the foregoing as the assignments of error upon which he intends to rely upon the argument of this case, and that the parts of the record in this case which he thinks necessary for the consideration of the foregoing assignments of error are the "case stated" or "statement of facts" agreed upon by the parties to this suit, the opinions of the court of quarter sessions of Crawford county, Pennsylvania, and of the superior and supreme courts of the State of Pennsylvania, and the assignments of error filed in the supreme court of Pennsylvania to the action of the superior court thereof.

EUGENE MACKEY,

Counsel for Plaintiff in Error.

I accept service this September 18, 1900, of plaintiff's foregoing declaration of the errors upon which he intends to rely and of the parts of the record he thinks necessary for the consideration thereof.

GEO. FRANK BROWN,

Solicitor of The City of Titusville, Defendant in Error.

107 [Endorsed:] No. 325, of October term, 1900. L. S. Clark, plaintiff in error, *v.* The City of Titusville, defendant in error. Plaintiff's assignments of error and declaration of the parts of the record he thinks necessary for the consideration thereof, with acceptance of service thereof by the solicitor of the defendant in error. Eugene Mackey, Titusville, Penna.

108 [Endorsed:] File No., 17,810. Supreme Court U. S., October term, 1900. Term No., 325. L. S. Clark, pl'ff in error, *vs.* The City of Titusville. Assignments of error and designation by pl'ff in error of parts of record to be printed and acceptance of service. Office Supreme Court U. S. Filed Sept. 19, 1900. James H. McKenney, clerk.

Endorsed on cover: File No., 17,810. Pennsylvania supreme court. Term No., 325. L. S. Clark, plaintiff in error, *vs.* The City of Titusville. Filed June 22nd, 1900.

No. 91.

Bruf
By. of Mackey for P.C.

Filed Oct. 11, 1901.

Office Supreme Court U.
FILED
OCT 11 1901
JAMES H. MCKENNEY,
Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1900.

No. ~~000~~ 91

L. S. CLARK, PLAINTIFF IN ERROR,

vs.

THE CITY OF TITUSVILLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

(17,810)

Ernest Mackey
Counsel for Plaintiff in Error



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 325.

L. S. CLARK, PLAINTIFF IN ERROR,

vs.

THE CITY OF TITUSVILLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

STATEMENT OF THE CASE.

The only contention in this case is the constitutionality of an ordinance of the city of Titusville, which we charge with violation of the Fourteenth Amendment. The offending ordinance divides the merchants of the city into so-called "classes" graduated by the amount of annual sales made and imposes upon each of such classes a tax which decreases in rate as the volume or value of the annual sales increases. The following table shows the classes created, the tax imposed upon each and the equivalent rate:

Class No.	Amount of Business.	Tax.	Rate.
10	\$ 1,000 or less.	\$ 5	5 or more mills
9	1,000 to \$ 2,500	10	10 to 4 mills
8	2,500 to 5,000	15	6 to 3 mills
7	5,000 to 10,000	25	5 to 2½ mills
6	10,000 to 20,000	35	3½ to 1¾ mills
5	20,000 to 30,000	50	2½ to 1 2-3 mills
4	30,000 to 40,000	60	2 to 1½ mills
3	40,000 to 50,000	70	1¾ to 1 2-3 mills
2	50,000 to 60,000	80	1 3-5 to 1 1-3 mills
1	60,000 and over.	100	1 2-3 or less.

The plaintiff in error is a merchant of the city and was arrested and sentenced for failure to pay the license tax imposed upon him by this ordinance. At the trial a "case stated" was agreed upon, which will be found printed on pages 1 to 6 of the Record. In this case stated, the ordinance is printed at length.

SPECIFICATIONS OF ERROR.

First. The said court erred in not holding that the ordinance of the city of Titusville, passed and approved, June 25, 1888, and recited in the case stated at length, conflicts with the fourteenth amendment to the Constitution of the United States and is, therefore, unconstitutional, null and invalid, because in subdividing the merchants and taxpayers of the said city and their property into so-called "classes," which differ not in kind, but only in amount or value and then levying or assessing upon each of such so-called "classes," so created, taxes which do not operate uniformly upon the members of each so-called "class," inasmuch as the lowest amount or value of property therein is required to pay the same amount of tax with the highest amount or value of property therein, the ordinance deprives plaintiff in error of his property without due process of law and denies to him the equal protection of the laws.

Second. The said court erred in not holding that the said ordinance conflicts with the fourteenth amendment to the Constitution of the United States and is unconstitutional, null and invalid because in subdividing the merchants and taxpayers of the said city into so-called "classes," which differ not in kind, but only in amount or value, and then levying or assessing upon each of the said "classes," taxes, which decrease in rate or ratio as the value of the "class" increases, the ordinance deprives the plaintiff in error of his property without due process of law and denies to him the equal protection of the laws.

Third. The said court erred in not holding that the said ordinance conflicts with the fourteenth amendment to the Constitution of the United States and is unconstitutional, null and void

because all the so-called "classes" erected by the said ordinance by value or quantity of business or property are but sub-divisions of a class and imposing taxes upon such sub-divisions without regard to a common ratio, either as between the several sub-divisions themselves, or as between the members of each of the said sub-divisions deprives the plaintiff in error of his property without due process of law and denies to him the equal protection of the laws.

Fourth. The said court erred in not holding that the classification attempted by the said ordinance deprives plaintiff in error of his property without due process of law and denies to him the equal protection of the laws and conflicts with the fourteenth amendment to the Constitution of the United States, and that the ordinance is unconstitutional, invalid and null.

Fifth. The court erred in affirming the judgment or sentence imposed upon the plaintiff in error by the Court of Quarter Sessions of Crawford County, Pennsylvania, and in not discharging him from custody.

ARGUMENT.

At the very threshold of our argument, we presume this Court desires to be fully advised that a federal question was properly raised in the the State Courts. And in doing so, we are at liberty to refer this Court to the opinions of the Lower Courts or to any other portion of the record.

Railroad Co. v. Marshall, 12 How. 165.

Cousin v. Blane, 19 Ibid. 202.

Murdock v. Memphis, 20 Wall 590.

Grass v. Mortgage Co., 108 U. S. 485.

United States v. Taylor, 147 Ibid 700.

Sayward v. Denny, 158 Ibid 183.

Egan v. Hart, 165 Ibid 190.

Sully v. American National Bank, 178 Ibid 298.

It will be sufficient even if the federal question be raised for the first time in the Supreme Court of the State.

Sully v. American National Bank, supra.

As this case was tried and argued in the Quarter Sessions of Crawford county upon an agreement of facts or "case stated," there are no pleadings in the case. But upon this argument, the Judge of the Quarter Sessions handed down a written opinion printed in the record, in which will be found the following statement:

"The defendant denies the legality of the ordinance upon two grounds, viz:

"First—* * * * *

"Second—The tax imposed is not uniform and the classification adopted is prohibited by the Fourteenth Amendment to the Federal Constitution."

Again:

"Let us then examine the second objection to validity of this ordinance and bearing in mind that it is a tax levied for general revenue purposes, determine whether the taxes levied by virtue thereof and under the classification therein adopted, are forbidden by the Fourteenth Amendment to the Federal Constitution."

The Superior Court of Pennsylvania said:

"The municipal legislation is alleged to be in violation of the provisions of the Federal Constitution and of the Constitution of the Commonwealth."

The third assignment of error filed before argument in the Supreme Court of Pennsylvania reads:

"The Court erred in not holding the ordinance in question unconstitutional because it denied to the prisoner the equal protection of the laws of this Commonwealth and thereupon conflicted with the fourteenth amendment to the Constitution of these United States."

After this examination of this preliminary question, which, we think, will be satisfactory to this Court, we will proceed with our argument.

WHAT IS THE NATURE OF THE POWER EXERCISED IN IMPOSING THIS TAX?

Both the act of the General Assembly of Pennsylvania, approved May 24, 1887, P. L. 217, and the act approved May 23, 1889, P. L. 287, under which the ordinance in question was passed and under which the city of Titusville is now doing business, in defining the powers conferred upon cities of the class, to which Titusville belongs, say they

"shall have power to levy and collect, for general revenue purposes, a license tax not exceeding one hundred dollars each, annually, on all auctioneers, contractors, druggists, hawkers, peddlers, produce or merchandise venders, bankers, brokers, pawn brokers, merchants of all kinds, persons selling or leasing goods upon instalments, grocers, etc. * * * * * and to regulate the collection of the same."

The title of the ordinance in question reads as follows

"An ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville."

The most scrutinizing examination of the ordinance itself, will fail to disclose any provision whatever for the regulation, control, supervision or inspection of any of the several businesses therein taxed. There is an absolute absence of any such provisions. The ordinance simply and solely levys a tax for the general revenues of the city and provides for its collection. We contend that the licenses imposed under the ordinance are not an exercise of the police power of the Commonwealth of Pennsylvania, but of the ordinary power of taxation.

Judge Dillon, in his work on Municipal Corporations, at page 766, says:

"The power to regulate and license particular branches of business or matters, is usually a police power; but when license fees or exactions are plainly imposed for the sole and main purpose of revenue, they are in effect taxes."

Judge Cooley (Constitutional Limitations, 201) says:

"A license is issued under the police power, but exaction of a license fee with a view to revenue would be an exercise of the power of taxation."

Beach, in his work on Public Corporations, § 386, says:

"The authority to license and regulate particular branches of business is usually regarded as a police power, but where licenses are imposed for purposes of revenue, they are taxes."

Tiedeman on Municipal Corporations, says:

"The license can only take one of two forms; either it is a tax upon the trade or business and then its legality or illegality is determined by its compliance with the constitutional restrictions upon the power of taxation, or it is a police regulation, which finds its justification and limitation in the prevention of some threatened evil."

In *Railway Company v. Hoboken*, 41 N. J. Law, 79, Depue, J., in delivering the opinion of the Court says:

"The exaction of a license fee for revenue purposes is clearly an exercise of the power of taxation."

In *St. Louis v. Insurance Company*, 47 Mo. 162, the Court says:

"A license is issued under the police power, but the exaction of a license fee with a view to revenue would be an exercise of the power of taxation."

In *State v. Hoboken*, 4 Vrooman, 282, the Court says:

"In the classification of corporate powers, the distinction between the power of taxation and the usual police powers, which are granted for the maintenance of peace and good order in the city and the administration of its internal affairs, is well settled. The functions of the latter are not primarily the raising of revenue."

Therefore, the statutes of Pennsylvania empowering the city to license for revenue and the title of the ordinance declaring it to be for revenue, and the body of the ordinance itself containing no provision for the regulation, inspection, supervision or control of the lines of business licensed, it is clearly not a police regulation, but an act of taxation. That this is true is conclusively shown by Mr. Justice Brewer in *Brennan v. City of Titusville*, 153 U. S., 289, where in an examination of the very ordinance now attacked by us, he says:

"The ordinance itself is entitled, 'An ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville,' and the special section requires a license for transacting business, the license being graded in amount by the time for which it is obtained. This license, therefore, the failure to take out which is the offense complained of and for which defendant was sentenced, is a license for 'general revenue pur-

poses,' within the very declarations of the ordinance. * * * *
Because a license may be required in the exercise of the police power, it does not follow that every license rests for its validity upon such police power. A state may legitimately make a license for the privilege of doing a business one means of taxation and that such was the purpose of this ordinance is obvious, not merely from the fact that in the title it is declared to be for 'general revenue purposes,' but also from the further fact that so far as we are informed by any quotations from or references to any part of the ordinance, there is no provision for any supervision, control or regulation of any business for which by the ordinance a license is required. In other words, so far as this record declares, this ordinance sought simply to make the various classes of business named therein pay a general tax for the general revenue of the city."

This ordinance of the city of Titusville, being an act of taxation and not of regulation and police power, distinguishes the case at bar from *Gundling v. Chicago*, 177 U. S. 185, which was an exercise of the police power. Mr. Justice Peckham therein thus quotes from counsel's brief.

"That the ordinance is unconstitutional and void as being an unreasonable exercise of the police power by imposing a license fee, etc."

And on page 188, referring to the ordinance of Chicago, says:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the state to determine and their determination comes within the proper exercise of the police power by the state."

UPON WHAT IS THIS TAX IMPOSED?

It is clearly not upon the right to receive property from a decedent either as a legatee or heir, and, therefore, the rule in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S., 283, and kindred cases does not apply. Those cases were argued and decided upon the principle that neither heir nor legatee has a natural inherent right to receive property from a decedent; that in a state of nature the property acquired by man upon his death reverted to the common fund; that the right to inherit as heir or receive as legatee are purely of statutory origin, and when the state creates such a right, it is in

the nature of a bounty or gift and she may attach thereto any "bonus," "tax" or "condition" she sees fit. The heir or legatee is not bound to accept the gift or bounty, but, if he does, he must take it burdened with the "tax," "bonus" or "condition." That is not the case at bar. Both by the Revealed Law, the law of nature and municipal law, man is bound to labor. To labor is not a gift from organized society, but a natural right. Yea, more, it is a duty imperatively imposed. The command of the Omnipotent is, thou shalt labor. Nature says you must or starve. The law of municipal action is, you must or be punished; for all the states, or at least that of Pennsylvania, from whence this appeal comes, have passed laws punishing vagrancy and idleness. The merchant of Titusville has, therefore, more than permission to labor. He is bound and commanded to do so. When the Commonwealth imposes an unjust and inequitable tax upon his labor or the fruits thereof, she cannot excuse herself by declaring to the merchant, To labor is a gift from me, you are not bound to do so, you may refuse to do so and thus avoid the "burden," "tax" or "bonus."

The tax assailed is assessed against the merchant by name, but this is true of all taxes, for inanimate things, and dumbbeasts do not pay taxes. Their owners do that. This tax is upon the merchants' property. This is true, whether it be considered a tax upon his business or upon the merchandise sold. If the latter, it is clearly so. It is, however, not a tax upon the business, for by the terms of the ordinance the assessor does not assess the business of the merchant, but passes beyond that and assesses the amount of merchandise sold by the merchant during the year. The tax is, therefore, upon this and not the business itself. But, even if it were upon the latter, yet still is it a tax upon property, for business is property. If a citizen be damaged in it, even though his stock of merchandise remains intact, yet no court would hesitate to award him damages in dollars and cents. The lawyer has a property in his profession, the physician in his practice, and even the day laborer in his occupation. To deprive a citizen of either is to deprive him of vested rights. Furthermore, this Court has over and over again, held that a tax upon a business is a tax upon the article

sold. In the often cited case of *Brown v. Maryland*, 12 Wheaton, 419, the Court, through Chief Justice Marshall, say:

"All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

In *Wilton v. Missouri*, 91 U. S., 278, Mr. Justice Field, speaking for this Court, said:

"The general power of the state to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. When the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods or indirectly through the license to the dealer."

DOES THE ORDINANCE ASSAILED CONFLICT WITH THE FOURTEENTH AMENDMENT?

We first charge the ordinance with inequality among the members of each so-called "class." Take for example the seventh class, the members of which make annual sales of merchandise ranging from \$5,000 to \$10,000. Each member is assessed with a tax of \$25. Is it equality to assess the annual sales worth \$5,500 with the same tax as that assessed against \$10,000? The same inequality can be found in each of the other so-called classes. We contend the amendment requires the state, whenever property or business is ranged or grouped into so-called classes, according to value, to assess thereon a percentage tax and not a specific one; the former, of which would insure absolute equality in taxation.

Secondly, we contend the state or city cannot arbitrarily carve out from either business or property an independent class, distinguished only by its value or quantity, and assess thereon a tax out of all proportion to that levied upon other like business or property. We do not deny the right of the state to classify generally, but contend that all classes chosen as the subject of a tax must be such as the Legislature finds and not such as it arbitrarily erects according to quantity or value, and that even if such classification

be permitted, there must be a common ratio between the taxes on the several classes, which, although denominated such in this ordinance are in reality nothing but sub-divisions of a class. Retail grocers constitute a class. Those doing a business of from \$50,000 to \$60,000 constitute only a sub-division thereof. A retailer selling annually \$60,000 of groceries, differs in neither kind, circumstances nor condition from one selling \$2,500 of groceries. They both handle the same class of merchandise, deal in the same manner, assume the same risks and bear the same relation to each other and to their fellow citizens. Why should the former pay a tax of one mill on the dollar of merchandise sold and latter ~~but~~ ten? Yet so this ordinance directs. We are now not discussing the wisdom of the tax, but of the power of the state and city to exact it. If the power exists to arbitrarily vary the tax in any degree whatever according to the amount of merchandise sold, the city may do so without limit and arbitrarily create favored classes according to quantity or value and release them wholly or nearly so from the burden of taxation and impose it wholly upon less favored ones, selected in the same manner. It may erect an arbitrary class of lawyers by selecting those who do a business of say ten thousand dollars or less per annum and visit a tax upon them and relieve lawyers doing a larger annual business wholly or nearly so from taxation. It may do the same with physicians, salaried men, or any other line of occupation or business. Such arbitrary power, we contend, is denied to every state by this amendment, which insures to every citizen equal and just laws of taxation and forbids classification, which is such only in name and in reality is nothing but selection. While we recognize that this Court is not an open harbor, to which every citizen may, under the fourteenth amendment, fly for relief from every unjust tax, yet we believe this Court will readily extend its assistance whenever a tax is visited upon a citizen by a state or city, which not merely in its practical operation works an injustice, but on its very face is clearly and intentionally unequal and unjust and which under the guise of an arbitrary classification selects the poorer and less fortunate members of a natural class of citizens for a severe tax while it entirely or almost so, relieves the wealthy or fortunate ones therefrom. It is true the four-

teenth amendment requires no cast iron rule of equality in taxation, but only that all persons subjected to legislation be treated alike under like circumstances and conditions. Take two retail grocers in the city of Titusville. They are both on the same street and almost side by side. They have the same sized store rooms, handle the same class of goods, carry the same sized stock of groceries, deal in the same manner, assume the same risks and bear the same relations to each other and to organized society. Wherein are they different in either circumstances or condition? Taxation is not regulation, but the taking by the state of the citizen's property sufficient to meet the financial needs of the government. Why should not these two grocers contribute in the same proportion? What is there so different in their condition or circumstances that would justify taking from the poorer one for the needs of the city ten mills on the amount of his annual sales and from the richer one, only one? If such artificial classification and indiscriminate taxation may be indulged in by the states, class legislation will run riot. Such unjust and unequal laws, if permissible, present to the Legislature an effective method to vent its passion or prejudice and impair, wreck or destroy legitimate business, property and occupation. All safeguards against class legislation will be thrust aside and in times of great financial distress and under its pinch, the poor and unfortunate have here the means to take from the stores of the industrious and frugal. At other times the powerful and greedy may impose upon the weak and unfortunate, the major part or the whole of society's rapidly growing expense. Either course is wrong and to be deplored and is forbidden by the amendment we invoke and which we must seek when our state courts refuse us relief. This amendment is the embodiment of the fundamental principle of our government — the equality of all men before the law. Every American citizen is the equal of his neighbor. Equal not only in right, but also in the burden of maintaining the government. The rule of faith, that he who has little shall lose it and he who has much shall have it added to, although the city of Titusville, judging from this ordinance, must think so, does not pertain in matters of taxation. There he who has much shall contribute much and he who has little, little; but always in

exact and equal proportion. Not one copper must the rich or poor contribute over his proportion, percentage or ratio.

In *Yick Wo v. Hopkins*, 118 U. S., 356, we find a concise declaration of what is meant by "equal protection of the laws":

"The equal protection of the laws is a pledge of the protection of equal laws."

And in the *Railroad Tax Cases* 13, Fed. Rep., 722, Mr. Justice Field declared:

"The fourteenth amendment to the Constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all powers of the state which can touch the individual or his property, including among them that of taxation. * * * * * What is called for under a constitutional provision requiring equality and uniformity in the taxation of property must be equally called for by the fourteenth amendment. The forced contribution from one which would follow taxation of his property without reference to a common ratio, would be inconsistent with that equal protection, which the amendment requires the state to extend to every person within its jurisdiction."

And again in *County v. Southern Pacific Railroad Company*, 18 Fed. Rep., 385, the same distinguished jurist said:

"Until the adoption of the fourteenth amendment, there was no restraint to be found in the constitution of the United States against the exercise of such power by the state. * * * * * The first section of the fourteenth amendment places a limit upon all the powers of the state, including among others, that of taxation. * * * Unequal taxation, so far as it can be prevented is, therefore, with other unequal burdens, prohibited by the amendment."

In *Gulf, Colorado and Santa Fe Ry. v. Ellis*, 165 U. S. 150, Mr. Justice Brewer said:

"Yet it is equally true that such classification cannot be made arbitrarily. The state * * * * * may not say that all men beyond a certain age shall be alone thus subjected or all men possessed of a certain wealth. There are distinctions which do not furnish any proper basis for the attempted classification."

The classes attempted to be arbitrarily created by the ordinance assailed, are not such, but merely sub-divisions of a class. These sub-divisions are not independent of each other and, therefore, the tax levied upon them must have some fixed ratio. For example,

in *Williamsport v. Wenner*, 172 Pa. St., 173, when a somewhat similar tax was upheld, the size of the initial class was \$1,000 and the tax imposed \$1.00. The next class was from \$1,000 to \$5,000, five times as large, and it paid \$5.00, five times as large a tax. The next class was from \$5,000 to \$10,000, ten times as large, and paid a tax of \$10.00, ten times as large, and so on, each class as it increased in size paid a tax which increased in the same ratio. In the case at bar, the rate decreased as the class increased. This is wrong. Judge Cooley, in his work on Taxation, at page 2, says:

"In an exercise of the power to tax, the purpose always is, that a common burden shall be sustained by common contributions, regulated by some fixed general rule and apportioned by the law according to some uniform ratio of equality."

And on page 169, he says:

"A license tax might not be unjust though laid upon a single occupation, provided that it was so laid that none who followed that occupation escaped it. Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the state. But when, for any reason, it becomes discrimination between individuals of the class taxed and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality and becomes inadmissible. It is immaterial on what ground the selection is made, whether it is because of residence in a particular portion of the taxing district, or because the persons selected have been remiss in meeting a former tax for the same purpose or because of any other reason, plausible or otherwise; for, if the principle of selection be once admitted, limits cannot be set to it and it may be made use of for the purpose of oppression or even of punishment."

And again, on page 243, he says:

"But the requirement of apportionment is absolutely indispensable in any exercise of the power to tax. There can be no such thing as valid taxation when the burden is laid without rule, either in respect to the subject of it or to the extent in which each must contribute. In this respect the Legislature is as powerless as any subordinate authority. It being impossible there should be taxation that is at once arbitrary and valid. Whenever, therefore, the tax is to be levied upon property, agents for its apportionment by the prescribed rule are as indispensable as the rule itself. And the rule they have to perform is, to make the sum demanded of any person or laid upon any one parcel of property have some fixed ratio, not only to the whole tax, but also to that demanded of every other person or laid upon every other piece of property. Without this,

as has been forcibly said, the exactions of money for the public are mere forced contributions and taxation will differ from eminent domain only in this: that the latter demands the property from the citizen when necessity requires it and on making compensation, while the former exacts at discretion and without compensation."

We are not unfamiliar with the argument that our position is a contention that self-government is a failure and that we may safely rely upon the good sense of the Legislature not to pass any arbitrary taxation. If this be true, why have a Constitution? Why hedge the Legislature about with limitations of its power, if it will never abuse that power? Man generally is bound to err, either intentionally or through ignorance, and human nature in the Legislature does not differ from human nature elsewhere. It was to protect the citizen against the errors of the Legislature, whether intentional or through ignorance, that written Constitutions were adopted. While we have much faith in the Legislature, we have infinitely more in the Constitution. The plaintiff in error prefers to seek its protection in this Court, rather than rely upon the platitude that popular government is not a failure.

Neither are we unfamiliar with the argument that some of the taxes, which we cite as possible to be levied, are extreme ones and have not been and may never be imposed by the city. In reply, we say the question before this Court is the existence of a power of classification and taxation and not of the degree to which it has been carried. If it exists at all, it may be exercised to the extent we have claimed. An ordinance is just as unconstitutional when it offends against the Bill of Rights in the smallest degree as when it does so in a gross degree. In either case it is the exercise by the state of a power which the Constitution says the state shall not exercise. We repeat to this Court the following words of Mr. Justice Bradley in *Boyd v. United States*, 116 U. S., 616, and which was cited by this Court in *Gulf, Colorado & Santa Fe Railroad v. Ellis*, 165 U. S., 150:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal methods of procedure. This can only be obviated by

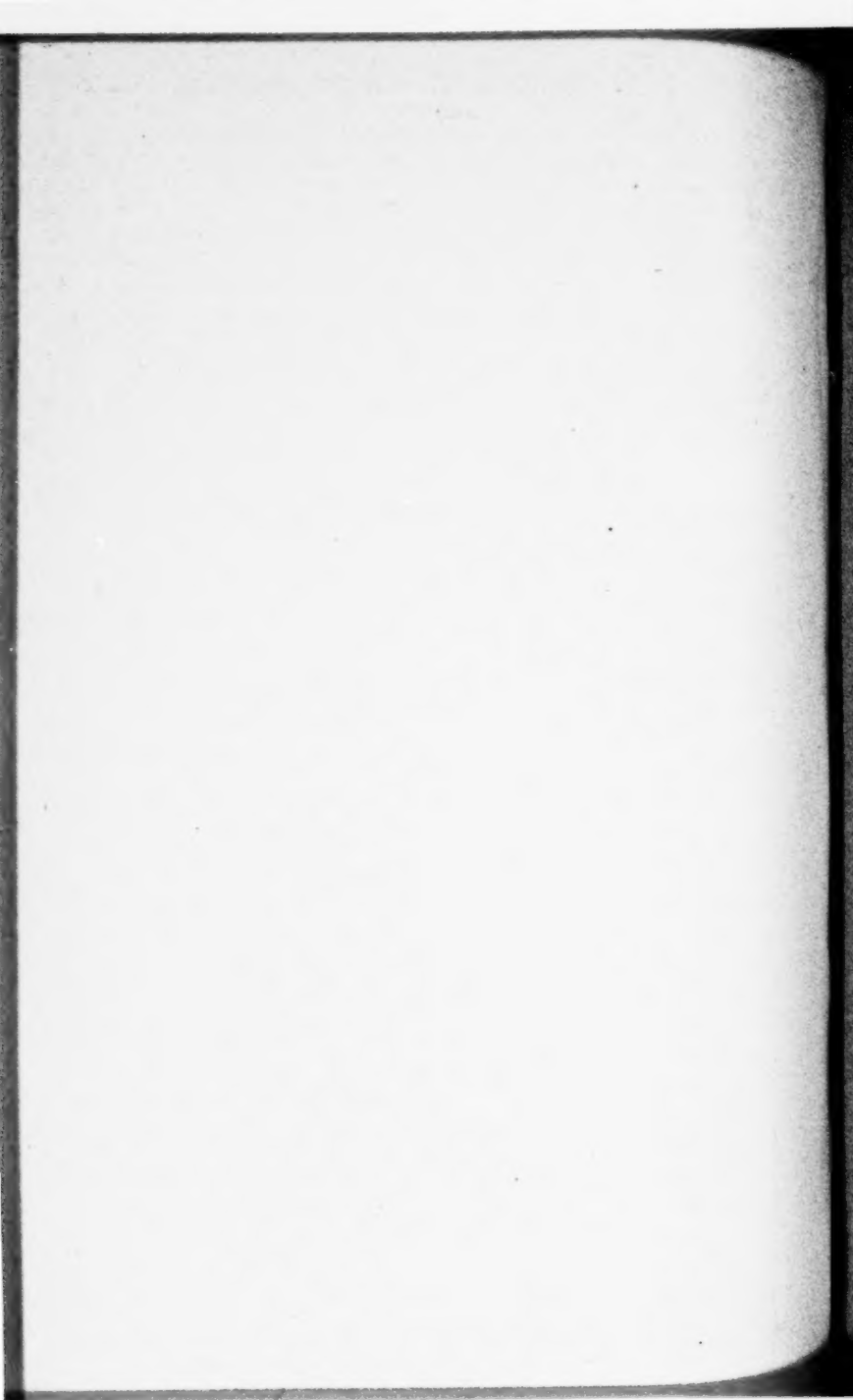
adhering to the rule that constitutional provisions for the securing of persons and property should be liberally construed. A close and liberal inspection deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachment thereon. Their motto should be 'obsta principus.'"

We respectfully submit that the ordinance and tax complained of, conflict with the Fourteenth Amendment and are, therefore, invalid, null and void and the prisoner should be discharged from custody.

EUGENE MACKEY,

Counsel for Plaintiff in Error.

October 5, 1901.



No. 91

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CASE No. 17,810

Filed Jan. 8, 1902.
In the Supreme Court of the United States.

October Term, 1900

Term No. 5000

91

L. S. Clark, Plaintiff in Error,
vs.

The City of Titusville.

In Error to the Supreme Court of the State of
Pennsylvania.

BRIEF OF DEFENDANT IN ERROR.

GEO. FRANK BROWN,
Counsel for Defendant in Error,
Titusville, Pa.

CASE No. 17,810

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900

TERM No. 325

L. S. CLARK, PLAINTIFF IN ERROR,

VERSUS

THE CITY OF TITUSVILLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

The City of Titusville is a city of the third class, governed by the provisions of the Act of Assembly of the State of Pennsylvania, approved May 23, 1889, P. L. 277; and by paragraph IV of Section 3 of Article V of the said Act, it is authorized and empowered to make ordinances for the following purposes among others, viz:

"IV. To levy and collect, for general revenue purposes, a license tax not exceeding one hundred dollars each, annually, on all auctioneers, contractors, druggists, hawkers, peddlers, produce or merchandise venders, bankers, brokers, pawn brokers, merchants of all kinds, persons selling or leaving goods upon installments, *grocers*, confectioners, butchers, restaurants, bowling alleys, billiard tables and other gambling

tables, drays, hacks, carriages, omnibuses, carts, wagons, street railway cars and other vehicles used in the city for hire or pay, lumber dealers, including commission men and all persons who make a business of buying lumber for sale at wholesale or retail, furniture dealers, saddle or harness dealers, stationers, jewelers, livery or boarding stable keepers, real estate agents, agents of fire, life or other insurance companies, market house companies, express companies or agencies, telegraph, telephone, steam heating, gas, natural gas, water, electric light or power companies or agencies, or individuals furnishing communication, light, heat or power by any of the means enumerated, *and to regulate the collection of the same.*"

The ordinance brought in question by this appeal, although enacted under the provisions of the unconstitutional Act of Assembly of the State of Pennsylvania, approved May 24, 1887, P. L. 196-204, was validated by the Act of May 13, 1889, and thus falls within the section of the Act of Assembly of the State of Pennsylvania governing municipalities, quoted above.

I.

The first two assignments of error, made by plaintiff in error, (*Record pages 103 and 104*), may well be considered together. Reduced to their more simple component parts, they attack the validity and constitutionality of the ordinance in question and allege it to be in conflict with the provisions of the fourteenth amendment of the Constitution of the United States for the following reasons:

1. It subdivided the merchants and tax-payers of the said city and their property into classes, so-called.
2. These classes differ not in kind but only in amount or value.
3. Levying or assessing upon each of such classes so created, taxes which do not operate uniformly upon the members of each class, because the lowest amount or value of property therein is required to pay the same amount of tax with the highest amount or value of property therein.

4. Levying or assessing upon each of said classes so created taxes which decrease in rate or ratio as the value of the class increases.

We shall examine these propositions in their order.

1. The first proposition brings us quickly to the question of classification in matters of taxation, but more directly to the nature of the tax under discussion. It will be seen that the plaintiff in error assumes throughout the several propositions the fact that *this is a tax on property*—his whole case is founded upon this theory. We, on the contrary, hold the tax in question to be a *license tax*—a tax on “property estimated by the volume of the annual sales”—*not* a tax on property.

The plaintiff in error seems to be unable to comprehend there is a distinction of this sort, recognized by the courts. A license tax is not a property tax. A business tax is not a property tax even though it be levied for general revenue purposes.

Morehouse v. Brigham, 41 La. Ann., p. 665.

Denver City R. Co. v. Denver, 29 L. R. A., p. 608, 611.

Davis v. Macon, 64 Ga., p. 128.

Newton v. Atchison, 31 Kan., p. 151.

Williamsport v. Wenner, 172 P. S., p. 173, 181.

Oil City v. Trust Company, 151 P. S., p. 454.

A very little thought will convince one that the stock of merchandise of two different or even two similar businesses can have no logical relation or ratio to their respective *volume of annual sales*. Yet if the proposition of plaintiff in error be carried to its logical conclusion, the tax in question is but a mere *tax on personal property*. This is the inherent and continuing fallacy in the theory of the plaintiff in error, Clark.

The distinction between a tax on property and taxation similar, yet distinguishable from it, has been inferentially drawn many times by this Court, notably in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S., p. 283, 287, 301, where the court distinguished between a *tax upon property* and a *tax upon the succession to an estate*.

Dow v. Beidelman, 125 U. S., p. 260.

Chicago R. R. Co., v. Iowa, 94 U. S., p. 164.

Having fixed the tax to be an act of general taxation, distinguishable from a tax on property and to be designated as a *business tax*, a *license tax*, or, in the words of the Supreme Court of the State of Pennsylvania, a tax on "property estimated by the volume of the annual sales," we shall consider whether the classification adopted creates bona-fide classes, or simply as insisted upon by the assignments of error "so-called classes."

The classification complained of will be found in the *Record* from page 59 to page 67; but on page 83 of the *Record*, Judge Thomas in the opinion of the lower court, has arranged it in tabular form. The classification principally objected to is that of retail business.

As a general proposition, a municipality has the right to classify, grade and fix the rate of taxes in the nature of a license tax made by it, within the limits fixed by its charter or other statutory provision, (*Kniper v. Louisville*, 7 Bush. p. 599) and within the limits fixed by the Federal and State Constitutions.

So far as this classification being within the limits of the provisions of the Constitution of the State of Pennsylvania there is no further controversy. That question has been set at rest by the decision of both the Supreme and Superior Courts of that state. (Record page 93, and page 102.)

Forsythe v. Hammond, 166 U. S. 519.

The Constitution of the United States permits classification of subjects of taxation on a proper basis and in a proper manner. The only restraint imposed by the fourteenth amendment is that unequal taxes may not be imposed upon property of the same kind, in the same class, in the same condition and used for the same purpose.

Kentucky R. R. Tax Cases, 115 U. S., p. 321.

Giozza v. Tiernan, 148 U. S., p. 657, 662.

Hayes v. Missouri, 120 U. S., p. 68.

Barbier v. Connelly, 113 U. S., p. 32.

Pacific Express Co. v. Siebert, 142 U. S., p. 339, 351.

2. The classification is a grading of different kinds—in that different volumes of business are grouped together. Again it must be impressed that it is not the merchants, the taxpayers or their property which it classified, but the business according to its volume—"the volume of annual sales."

Classification according to the amount of business done has been frequently recognized by the Federal Courts.

Dow v. Beidelman, 125 U. S., p. 690.

Chicago R. R. Co. v. Iowa, 94 U. S., p. 164.

3. It is not contended by the defendant in error that the classification adopted in this ordinance of the City of Titusville produces absolute equality, and it not expected of the City Councils, nor of any other legislative body levying taxes, that they shall produce absolute equality in their measures. Indeed, it has been asserted in Commonwealth v. Delaware Division Canal Co., 123 P. S., page 620, in passing upon the constitutional provisions relating to taxation: "Absolute equality is of course unattainable; a mere approximate equality is all that can reasonably be expected. A mere diversity in the methods of assessment and collection, however, if these methods are provided by general laws, violates no rule of right, if when these methods are applied the results are practically uniform. If there is a substantial uniformity, *however different the procedure*, there is a compliance with the constitutional provisions." Fox's App., 112 Pa., 353; *even when there may be some disparity of results*, if uniformity is the purpose of the legislature, there is a substantial compliance. Hunter's App., 18 W. N., 411, 394; Loughlin's App., 19 W. N., 517."

And further on in the same opinion, at page 623, it is well said by the learned Judge: "The moment we concede the power to classify we have disposed of the question of uniformity, for then all that is required by the constitution is that the taxes shall be uniform upon the members of a class." And in Kittanning Coal Co. v. Commonwealth, 79 Pa., p. 105,

Chief Justice Agnew used almost identically the same language: "It is clear, therefore, that the moment we concede the power to classify, we have disposed of the constitution of uniformity, for then all that is required by the constitution is uniformity of taxes among the members of a class."

Again plaintiff in error relies wholly on the favorite theory that property is being and has been classified for purposes of taxation. Taking out that prop, the proposition has not a legal leg to stand upon.

4. The fourth proposition is very nearly akin to the third proposition. Again the idea of a classification of property intrudes itself. Whether the taxes "decrease in rate or ratio as the value of the class increases" or increases in rate or ratio as the class becomes larger, as was the case in *Magoun v. Trust Company*, *supra*, what difference is there in the legal principle involved? The fact yet remains, each class is taxed separately and independently and without discrimination existing in the same class.

II.

The third assignment of error attacks the validity of the ordinance and desires it declared unconstitutional and in conflict with the fourteenth amendment to the Constitution of the United States because "all the so-called classes erected by the said ordinance by value or quality of business or property are but subdivisions of a class" and impose "taxes upon such subdivisions without regard to a common ratio either as between the several subdivisions themselves or as between the members of each of the said subdivisions." Eliminating from this proposition the idea of "classes erected, by value or property," and the question of the right to classify—both of which ideas are contained in the first two assignments of error, and also eliminating the idea of a common ratio between members of a class which is the life of the second assignment of error, and then we have this naked proposition—the rates of the tax on different classes must bear some relation or ratio to each other. This proposition is absolutely denied.

In *Magoun v. Illinois Trust and Savings Bank*, *supra*, the Illinois inheritance tax law of June 15, 1895, came under the scrutiny of the Supreme Court on constitutional objections. This statute classified inheritors into three classes of near relatives, remote relatives and strangers, imposing a different rate of taxation as to each of these classes, and beyond this classification the statute provided that as to the third class, that is, strangers, the rate of taxation should vary with the amount of the estate. This was a progressive tax, so called, wherein the rate of taxation was increased as the amount of the legacy passes from one sum to another, the rates bearing no "relation or ratio to each other." Thus the statute provided, *inter alia*, that upon a legacy over fifty thousand dollars, the rate should be six per cent., while upon one under ten thousand it was but three per cent. The Court, speaking by Justice McKenna, affirmed the constitutionality of the act, passing expressly upon the question of classification involved, and said: "The clause of the Fourteenth Amendment especially invoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances.'" *Kentucky Railroad Tax cases* 115 U. S., 321, 337. It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. *Hayes v. Missouri* 120 U. S. 68

* * It may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the state a wide latitude as far as interference with this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in *Mobile County v. Kimball*, 102 U. S., 691

that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive state legislation. And he observed in another case: "It is hardly necessary to say that hardship, impolicy or injustice of state laws is not necessary an objection to their constitutional validity." The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have *the attribute of equality of operation*, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons *according to their relations.*"

Again in *Magoun v. Illinois Trust and Savings Bank*, *supra*, the right from the Federal standpoint to tax the classes differently and independently was fully recognized. At this point the court said with reference to this subject: "There are four classes created, and manifestly there is equality between the members of each class. *Inequality is only found by comparing the members of one class with those of another.* It is illustrated by appellant as follows: One who receives a legacy of \$10,000 pays 3 per cent., or \$300, thus receiving \$9,700 net; while one receiving a legacy of \$10,001 pays 4 per cent. on the whole amount, or \$404.04, thus receiving \$9,600.96, or \$99.04 less than the one whose legacy was actually \$1.00 less valuable. This method is applied throughout the class.

"These, however, are conceded to be extreme illustrations, and we think, therefore, that they furnish no test of the practical operation of the classification. When the legacies differ in substantial extent, if the rate increases the benefit increases to greater degree.

"If there is unsoundness it must be in the classification. The members of each class are treated alike—that is to say, all who inherit \$10,000 are treated alike. There is equality therefore within the classes. If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount, but varies with the amount arbitrarily fixed, and hence

that an inheritance of \$10,000 or less pays 3 per cent., and that one over \$10,000 pays not 3 per cent. on \$10,000 and an increased percentage on the excess over \$10,000, but an increased percentage on the \$10,000, as well as on the excess, and it is said as we have seen, that in consequence one who is given a legacy of ten thousand and one dollars by the deduction of the tax receives \$9.04 less than one who is given a legacy of \$10,000. *But neither case can be said to be contrary to the rule of equality of the Fourteenth Amendment.* That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances."

This latest authoritative decision on the equality clause of the Fourteenth Amendment is recognized as setting at rest the legal objections to classification as viewed from the Federal standpoint, and it follows very aptly the numerous decisions of the Supreme Court of the United States leading up to it, and, being a decision upon the general subject of taxation, it is the more pertinent to the case at bar. The Supreme Court had before declared that the Fourteenth Amendment was not intended to compel the state to conform to an iron rule of equal taxation. *Bell's Gap R. R. Co. v. Pennsylvania, supra; Giozza v. Tiernan, supra*, and in *State Railroad Tax Cases*, 92 U. S., p. 575, 612, it was held: "Perfect equality and perfect uniformity of taxation as regards individuals or corporations, *or the different classes of property subject to taxation*, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which may be devised, must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect."

In the Kentucky R. R. Tax cases, 115 U. S., p. 321, 337, Mr. Justice Matthews said: "The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."

And in *Giozza v. Tiernan*, 148 U. S., p. 657, 662, Chief Justice Fuller said, in construing the Fourteenth Amendment: "It is enough that there is no discrimination in favor of one as against another of the same class."

"The only restraint imposed by the Fourteenth Amendment is that unequal taxes may not be imposed upon property of the same kind, in the same class, in the same condition, and used for the same purpose.

In *Hayes v. Missouri*, 120 U. S., p. 68, a statute of the State of Missouri was considered which provided that in capital cases, in cities having a population of over 100,000 inhabitants, the state shall be allowed fifteen peremptory challenges to jurors, while elsewhere in the state it is allowed in such cases only eight peremptory challenges, and it was held that the statute does not deny to a person accused and tried for murder in a city containing over 100,000 inhabitants the equal protection of the laws enjoined by the Fourteenth Amendment of the Constitution, and that there was no error in refusing the state's peremptory challenges to eight. And Justice Field said:

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and the liabilities imposed."

In *Barbier v. Connelly*, 113 U. S., p. 32, it was said by Justice Field, in construing the Fourteenth Amendment: "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which is carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

And in *Pacific Express Co. v. Seibert*, 142 U. S., 339, 351, the Court, through Mr. Justice Lamar, said: "This Court has repeatedly laid down the doctrine that diversity of taxation,

both with respect to the amount imposed and the various species of property selected either for bearing its burdens or from being exempt from them, is not inconsistent with a perfect uniformity, and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principles of uniformity and equality in taxation and of a just adaptation of property to its burdens." And it was said in *Merchants' Bank v. Pennsylvania*, 167 U. S., 461: "Indeed, this whole argument of a right under the Federal Constitution to challenge the tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap Railroad v. Pennsylvania*."

III.

The fourth and fifth assignment of errors are general propositions embracing and following the first three and have been answered in the preceeding brief.

In concluding this brief of argument we desire to give two more citations. In his dissenting opinion in *Magoun v. The Illinois Trust and Savings Bank*, *supra*, Mr. Justice Brewer said: "Of course absolute equality is not attainable, and the fact that a law, whether tax law or other, works inequality in its actual operation, does not prove its unconstitutionality. (*Merchants Bank v. Pennsylvania*, 167 U. S., 461), but when a tax law directly, necessarily and intentionally creates an inequality of burden, it then becomes imperative to inquire whether this inequality, thus *intentionally created*, can find any constitutional justification."

In the opinion of the court in the same case 170 U. S., p. 294. Mr. Justice McKenna said: "The state may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course, 'Clear and hostile discrimination against particular persons or classes, especially as are of un-

usual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition, said Mr. Justice Bradley, in *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232, 237.' "

Upon these equally clear citations of authority we would rest our cause and it is respectfully contended that the ordinance comes within the constitutional limitations.

Geo. Z. Brown,
Deft. in Error.

Supreme Court of the United States.

No. 91.—OCTOBER TERM, 1901.

L. S. Clark, Plaintiff in Error, } In error to the Supreme Court of the
vs. } State of Pennsylvania.
 The City of Titusville.

[March 3, 1902.]

Mr. Justice McKENNA delivered the opinion of the Court.

This case is here on error to the Supreme Court of the State of Pennsylvania. It involves the constitutionality of an ordinance of the city of Titusville imposing a license tax upon the merchants of the city. The particular contention is that the ordinance violates the equality prescribed by the Fourteenth Amendment of the Constitution of the United States, in that it divides the merchants into arbitrary classes.

The trial court sustained the ordinance, and its judgment was affirmed by the Supreme Court upon the opinion delivered by the trial court.

The case was submitted upon a case stated in the nature of a special verdict, from which it appeared that the city was duly incorporated, and passed on June 25, 1888, the ordinance complained of. The provisions of the ordinance were set out, and it was stipulated that if the court should be of the opinion that the ordinance was valid a fine should be entered against the defendant (plaintiff in error) for the total of the taxes prescribed.

The ordinance imposes a license tax upon persons who carry on certain occupations in the city. Persons in different occupations pay different amounts, and persons in the same occupation are classified by maximum and minimum amount of sales. For instance, persons dealing in merchandise are classified as follows, and we quote from the opinion of the trial court:

Class.	Business.		Tax.
1.....	Over	\$60,000.....	\$100.00
2.....	\$50,000 to	60,000.....	80.00
3.....	40,000 to	50,000.....	70.00
4.....	30,000 to	40,000.....	60.00
5.....	20,000 to	30,000.....	50.00
6.....	10,000 to	20,000.....	35.00
7.....	5,000 to	10,000.....	25.00
8.....	2,500 to	5,000.....	15.00
9.....	1,000 to	2,500.....	10.00
10.....		1,000.....	5.00

Wholesale.			
1.....	\$100,000 and upwards.....		\$60.00
2.....	60,000 to 100,000.....		50.00
3.....	50,000 to 60,000.....		40.00
4.....	40,000 to 50,000.....		35.00
5.....	30,000 to 40,000.....		30.00
6.....	20,000 to 30,000.....		25.00
7.....	10,000 to 20,000.....		20.00
8.....	5,000 to 10,000.....		15.00
9.....	2,500 to 5,000.....		10.00
10.....	2,500.....		5.00

It is with this classification that we have immediate concern, because the plaintiff is a retail grocer. He was assessed in the sixth class in 1895, and in the seventh class in 1896.

The objection that plaintiff makes to the ordinance is, that it classifies by amount or value with the result (1) that the lowest amount or value of property of a class "is required to pay the same amount of taxes with the highest amount or value of property therein;" (2) that the differences are not in kind but only in amount, or value, and that the taxes decrease in rate or ratio as the value of the class increases; (3) that the so-called classes are subdivisions of a class, and taxes are imposed upon such subdivisions without regard to a common ratio, either as between the several subdivisions, or as between the members of each of the subdivisions. These objections are but the expression of the effect of classification by amount, and have been made before and considered before by this court, and the judgment has been adverse to the contention of plaintiff in error. We do not think that it is necessary to review the cases or enter again into the reasoning upon which they were based.

Classification by amount came up for consideration and decision in *Magoun v. Illinois Trust & Savings Bank*, (170 U. S. 283,) and was sustained. That case, plaintiff in error recognizes, may be urged against his contention and attempts to limit its decision to the power of a State over inheritances, and to explain by that power not only the taxes imposed, but the discriminations which were claimed to have resulted from grading the taxes by the amount of the legacy. This, we think, is a misunderstanding of the opinion. The contentions of the parties in the case were extremely opposite. The appellee claimed that the power of the State could be exerted to the extent of making the State the heir of everybody; the appellant asserted a natural right of children to inherit. We expressed no opinion on either contention, but chiefly directed our consideration and decision to the alleged discriminating features of the law of Illinois. We said: "Our inquiry must be not what will satisfy the provisions of the State constitutions, but what will satisfy the rule of the Federal Constitution. The power of the States over successions may be as plenary in the abstract

as appellee contends for, nevertheless it must be exerted within the limitations of that Constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws."

The law of Illinois was charged with inequality of operation because of the classes which it created. It was asserted, as it is in the case at bar, that the classes were formed upon arbitrary differences, and the provisions of the statute which fixed the tax upon legacies to strangers to the blood of the intestate were vigorously assailed. Those provisions were as follows:

"On each and every hundred dollars of the clear market value of all property and at the same rate for any less amount on all estates of ten thousand dollars and less, three dollars; on all estates over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars; and on all estates over fifty thousand dollars, six dollars. Provided, that an estate in the above case, which may be valued at a less sum than five hundred dollars, shall not be subject to any duty or tax."

Manifestly, there was inequality between the members of different classes, and that was conceded in the opinion, but as manifestly there was equality between the members of each class, and that equality was held to satisfy the Fourteenth Amendment of the Constitution of the United States; and the reasoning by which that conclusion was supported is applicable to the case at bar. We met the contention accurately and squarely that there was no reasonable distinction between the classes. We said:

"If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such, upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount but varies with the amounts arbitrarily fixed, and hence that an inheritance of \$10,000 or less pays 3 per cent, and that one over \$10,000 pays not 3 per cent on \$10,000 and an increased percentage on the excess over \$10,000, but an increased percentage on the \$10,000 as well as on the excess, and it is said, as we have seen, that in consequence one who is given a legacy of \$10,000 and one dollar by the deduction of the tax receives \$99.04 less than one who is given a legacy of \$10,000. But neither case can be said to be contrary to the rule of equality of the Fourteenth Amendment. That rule does not require, as we have seen, exact quality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money, it is on the right to inherit, and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat 'all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar, Congress of the United States has classified the right

of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality; nevertheless they are universally imposed, and their illegality has never been questioned."

Plaintiff in error, however, contends that the tax in the case at bar is a tax on property, not on the privilege to do business, because the final incidence of the tax is on the merchant, and is paid by him. But every tax has its final incidence on some individual. That effect, therefore, cannot be urged to destroy well recognized distinctions. The tax in the case at bar is a tax on the privilege of doing business regulated by the amount of sales, and is not repugnant to the Constitution of the United States.

Judgment affirmed.

Mr. Justice HARLAN did not hear the argument and took no part in the decision.

True copy.

Test:

Clerk Supreme Court, U. S.